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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHAD ROBERT BOYKO, Defendant and Appellant.	E054488 (Super.Ct.No. FVI1002448) OPINION

APPEAL from the Superior Court of San Bernardino County. Miriam Ivy Morton, Judge. Affirmed in part; reversed in part and remanded with directions.

Raymond M. DiGuiseppe, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Nguyen Tran, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Chad Robert Boyko was charged with corporal injury to a spouse, cohabitant, or parent of his child, resulting in a traumatic condition (Pen.

Code, § 273.5, subd. (a), count 1),[1] stalking (§ 646.9, subd. (a), count 2), dissuading a witness by force or threat (§ 136.1, subd. (c)(1), count 3), and cutting a utility line (§ 591, count 4). It was further alleged that defendant had suffered a prior prison conviction. (§ 667.5, subd. (b).) Defendant entered a plea agreement and pled guilty to count 1. In exchange, the trial court sentenced him to two years in state prison and dismissed the remaining charges and allegation. The court imposed various fees, including a booking fee and appointed counsel fees. The court also imposed a restraining order prohibiting defendant from having any contact with the victim for the next 10 years.

On appeal, defendant contends that: (1) the imposition of the restraining order was an abuse of discretion, since the trial court failed to consider the required factors under section 273.5 before imposing it; (2) the restraining order is constitutionally overbroad; and (3) the court failed to determine defendant's ability to pay before ordering him to pay booking fees and appointed counsel fees.[2] We agree that the trial court improperly issued the restraining order without considering the factors listed in section 273.5. We thus reverse the restraining order and remand the matter for the court to consider such factors to determine if a restraining order is necessary. We also

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[1] All further statutory references will be to the Penal Code, unless otherwise noted.

[2] This court granted defendant's petition for writ of habeas corpus, allowing him to file a late notice of appeal from the judgment on the basis that the 10-year restraining order was not a condition of the plea agreement, and his counsel did not advise him of his right to appeal.

reverse the order to pay appointed counsel fees and remand the matter for the court to make a determination of defendant's ability to pay such fees. In all other respects, we affirm.

FACTUAL BACKGROUND

The parties stipulated to the factual allegations in the complaint and the police report as the factual basis for the plea.[3]

ANALYSIS

I. The Court Abused Its Discretion in Issuing the Restraining Order

Defendant argues that the court abused its discretion in issuing a 10-year restraining order under section 273.5, subdivision (i), prohibiting him from having any contact with the victim. He asserts that the court's decision was not based on any of the factors necessary for a proper determination, since the court had no information before it regarding the current offense, defendant's background, or his relationship with the victim. The People's only contention is that defendant waived the issue on appeal by failing to object at the time of sentencing. We conclude that the matter should be remanded for the trial court to consider the factors listed in section 273.5, subdivision (i), to determine the necessity and length of a restraining order.

A. *Relevant Background*

At the sentencing hearing, the court informed defendant that he had a right to have his matter referred to probation for a presentence investigation and report, and

[3] The record on appeal does not contain the police report.

that he had a right to a hearing following the receipt of that report. Defendant waived those rights and asked the court to sentence him without further delay. The court then ordered him to pay certain fees and sentenced him to two years in prison, pursuant to the terms of the plea agreement. The court dismissed the balance of the charges and the enhancement allegation and terminated a grant of probation in an unrelated criminal matter. The court proceeded to the matter of a restraining order, as follows:

"The Court: And then we have a CLETS order. [¶] Mr. Boyko[,] I'm going to sign this order. It's in place for the next ten years. You cannot have any contact at all with [the victim]. Do you understand?

"The Defendant: Yeah. She sent me mail.

"The Court: You cannot reply to it.

"The Defendant: She can send it, but I can't reply? Sorry.

"The Court: You are not allowed to have any contact with her. You can't send her a letter, a note, a message, a message through another person. You can't call her. You're not allowed to have any contact with her. Ten years. I'll sign this and we'll serve you with the order before you leave court."

The court then concluded the proceedings and remanded defendant to custody.

B. *Defendant Did Not Waive the Issue*

Defendant asserts the issue was not waived because he did not have a meaningful opportunity to object to the restraining order. He acknowledges that "complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on

appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 356 (*Scott*).) However, "the requirement of an objection at trial is only realistic if counsel is given a 'meaningful opportunity to object.' [Citation.]" (*People v. Superior Court* (*Dorsey*) (1996) 50 Cal.App.4th 1216, 1223 [Fourth Dist., Div. Two].) "This opportunity can occur only if, during the course of the sentencing hearing itself and before objections are made, the parties are clearly apprised of the sentence the court intends to impose and the reasons that support any discretionary choices." (*Scott*, at p. 356.)

Here, defendant was denied a meaningful opportunity to object during the sentencing hearing, since the parties were not clearly apprised of the sentence the court *intended* to impose. (*Scott*, *supra*, 9 Cal.4th at p. 356.) The court did not address the matter of a restraining order until the very end of the proceedings, after it had taken defendant's plea, dismissed the remaining charges, procured a waiver of a presentence investigation and report, and imposed the two-year stipulated sentence. Furthermore, when the court did address the restraining order, it simply informed defendant that it was signing a restraining order that would be in place for the next 10 years. The court instructed defendant as follows: "You're not allowed to have any contact with her. Ten years. I'll sign this and we'll serve you with the order before you leave court." The court's comments clearly demonstrate it was not apprising the parties of the sentence it intended to impose, or the reasons that supported its discretionary choice. (*Scott*, at p. 356) Rather, the court was definitively telling defendant that it was imposing the restraining order. Thus, there was no meaningful opportunity to object.

(*Ibid*.) We additionally note that the plea agreement made no mention of a restraining order.

The People claim that defendant was provided with a meaningful opportunity to object during the dialogue between the court and him concerning the restraining order. However, the brief exchange that followed the court's announcement of the restraining order appeared to simply be an explanation of the terms of the order. The People claim that defendant had another opportunity to object when the court asked, "Anything else for Mr. Boyko?" However, this question was the court's last comment before remanding defendant to custody. Given the court's clear indication that the restraining order was not up for debate, its reference to "[a]nything *else*" implied that it was done discussing the matter of the restraining order.

The People also rely upon *People v. Zuniga* (1996) 46 Cal.App.4th 81 (*Zuniga*) in arguing that defendant had a meaningful opportunity to object. However, that case is distinguishable. In *Zuniga*, the defendant contended that the court failed to state its reasons for sentencing him to prison rather than reinstating his probation. The People argued that he waived the issue on appeal by failing to object at the time of sentencing. (*Id*. at p. 84.) The defendant asserted that he was denied a meaningful opportunity to object. (*Ibid*.) The court concluded that he did have such opportunity, since, at the time his probation was revoked, he was in court with counsel, was given the opportunity to address the court, heard the court pronounce sentence, stated that he understood it, and voiced no objections. (*Ibid*.) Furthermore, there was a presentence

report by the probation officer recommending that probation be revoked, so the defendant had notice and an opportunity to object. (*Ibid*.)

In the instant case, defendant waived his right to have the matter referred to probation for a presentence investigation and report. Thus, unlike the defendant in *Zuniga*, defendant here had no notice of the restraining order, or any meaningful opportunity to object.[4]

C. *The Court Had No Basis for Issuing the 10-year Restraining Order*

Section 273.5, subdivision (i), provides: "Upon conviction under subdivision (a), the sentencing court shall also consider issuing an order restraining the defendant from any contact with the victim, which may be valid for up to 10 years, as determined by the court. It is the intent of the Legislature that the length of any restraining order be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family. This protective order may be issued by the court whether the defendant is sentenced to state prison, county jail, or if imposition of sentence is suspended and the defendant is placed on probation."[5]

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[4] The People also cite *People v. De Soto* (1997) 54 Cal.App.4th 1. However, the issue in that case was whether *Scott* applied where a general boilerplate objection was made at the time of the sentencing, and specific objections were then raised on appeal. (*Id*. at p. 8.) Such was not the case here.

[5] Although the court did not specify that it was imposing the restraining order pursuant to section 273.5, subdivision (i), both parties presumed that it was doing so, since he pled guilty to a violation of s ection 273.5, subdivision (a).

Aside from the issue of the waiver, the People concede the merits of defendant's argument that the court abused its discretion in issuing the restraining order. The trial court did not have a probation report, police report, or any other information before it regarding the facts of the case, defendant's current relationship with the victim, his background, or the likelihood of him reoffending. As the People even point out, it was "unclear on what authority or facts the trial court relied . . . in issuing the restraining order." Since there was no evidence upon which to base the decision to impose a 10-year restraining order, the court abused its discretion in making the order. (See *People v. Cluff* (2001) 87 Cal.App.4th 991, 998.)

The parties agree that the appropriate remedy is to remand the matter for the trial court to consider the factors listed in section 273.5, subdivision (i), in order to determine whether a restraining order is necessary and, if so, how long it should be. (See § 1260 [an appellate court may "remand the cause to the trial court for such further proceedings as may be just under the circumstances"].)

We acknowledge defendant's additional argument that the restraining order is unconstitutionally overbroad, in that it constitutes a complete ban on his right of association with the victim. Because we remand the order on other grounds, we will not address this argument, except to note that "restriction of the right of association is part of the nature of the criminal process," and that "[c]ourts in other jurisdictions have upheld the constitutionality of similar conditions on grants of probation or parole." (*People v. Robinson* (1988) 199 Cal.App.3d 816, 818.)

II. The Trial Court Failed to Make a Determination of Defendant's Ability to Pay Appointed Counsel Fees

Defendant argues that the orders requiring him to pay $750 in appointed counsel fees and $79.86 in booking fees must be stricken because the court failed to make a determination of his ability to pay.[6] He further contends that there is insufficient evidence to support any such determination. The People respond that because defendant did not object below to the imposition of the fees in the absence of an ability to pay determination, he has forfeited these claims. Otherwise, the People agree that the case should be remanded for a hearing to determine his ability to pay. We conclude that defendant has not forfeited his claims, and that the matter should be remanded for the court to determine his ability to pay appointed counsel fees. However, we also conclude that the court was not required to determine his ability to pay the booking fees.

We first consider the People's contention that defendant has waived his claims by failing to object to the fees below. We recognize that some courts have found that a defendant forfeits any objection to a fee by failing to object in the lower court. (See, e.g., *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1071-1072.) However, "we find that authority distinguishable, and do not believe it can be rationally extended to bar

[6] The minute order indicates that the appointed counsel fees were in the amount of $150. However, the reporter's transcript reflects that the court ordered $750 in appointed counsel fees. "Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls. [Citations.]" (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.)

objections to an order for reimbursement of *counsel* fees, for the reason that unless the defendant has secured a new, independent attorney when such an order is made, [he] is effectively *unrepresented* at that time." (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1214.) In other words, a forfeiture cannot "properly be predicated on the failure of a trial attorney to challenge an order concerning *his own fees*." (*Id*. at p. 1215.) "[W]hen a defendant's attorney stands before the court asking for an order taking money from the client and giving it to the attorney's employer, the representation is burdened with a patent conflict of interest . . . ." (*Ibid*.)

Moreover, defendant's contentions are based on the insufficiency of the evidence to support the orders. "[S]uch claims do not require assertion in the court below to be preserved on appeal. [Citations.]" (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397 (*Pacheco*).)[7] We accordingly conclude that defendant's claims regarding the appointed counsel and booking fees are not forfeited on appeal, and we proceed to the merits of these claims. (See *ibid*.)

A. *There Was No Evidence of Defendant's Ability to Pay Appointed Counsel Fees*

The court ordered defendant to pay appointed counsel fees in the amount of $750. It did not cite the statutory basis of the order, but we assume the basis was

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[7] We recognize that the Supreme Court is currently reviewing the question of whether a failure to object to the imposition of a booking fee at sentencing forfeits a claim on appeal that the evidence is insufficient to support a finding of the defendant's ability to pay. (See *People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513.)

section 987.8.[8] That section "authorizes the court to order criminal defendants to pay all or part of the cost of their appointed counsel after the trial court determines the defendant has a present ability to pay. The ability to pay includes the defendant's reasonably discernible future financial position, limited to the next six months." (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537, fn. omitted; § 987.8, subd. (g)(2)(B).) "The court's finding of the defendant's present ability to pay need not be express, but may be implied through the content and conduct of the hearings. [Citation.] But any finding of ability to pay must be supported by substantial evidence. [Citations.]" (*Pacheco, supra,* 187 Cal.App.4th at p. 1398.)

We read section 987.8 as "expressly requiring a finding—whether express or implied—by the court of a defendant's ability to pay as a condition to an order assessing attorney fees . . . ." (*Pacheco, supra,* 187 Cal.App.4th at p. 1398.) Here, there is nothing in the record addressing the issue of defendant's ability to pay. Moreover, there is no evidence in the record of defendant's assets or means of income from which the court could have made a determination of his ability to pay attorney fees. We further note that section 987.8 contains a presumption that those sentenced to prison are unable to pay. It provides: "Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined *not* to have a reasonably

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[8] Section 987.8, subdivision (b), provides in pertinent part: "In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court . . . the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof."

discernible future financial ability to reimburse the costs of his or her defense." (§ 987.8, subd. (g)(2)(B), italics added.) The court made no finding of unusual circumstances.

In sum, there is no evidence in the record of defendant's assets, employment status, or other means of income from which the court could have made a determination of his ability to pay appointed counsel fees. There is thus no required finding of his ability to pay attorney fees, either express or implied and, for this reason, the attorney fee order cannot stand. (*Pacheco*, *supra*, 187 Cal.App.4th at p. 1399.) The matter should be remanded for the trial court to determine defendant's ability to pay, in accordance with section 987.8. (See *id*. at p. 1404.)

B. *The Court Properly Imposed the Booking Fee*

The court here imposed a $79.86 booking fee payable to the Town of Apple Valley. The court did not identify the specific statutory basis of the booking fees, but the record shows that an officer from the Apple Valley Police Department arrested defendant, and the fee was ordered to be paid to the Town of Apple Valley. The identification of the Town of Apple Valley as payee indicates the basis was Government Code section 29550.1, which provides that "[a]ny city, special district, school district, . . . or other local arresting agency whose officer or agent arrests a person is entitled to recover any criminal justice administration fee imposed by a county from the arrested person if the person is convicted of any criminal offense related to the arrest." (See also, *Pacheco*, *supra*, 187 Cal.App.4th at p. 1399, fn. 6.)

Government Code section 29550.1 does not require a finding of ability to pay. (See *People v. Mason* (2012) 206 Cal.App.4th 1026, 1033-1034 (*Mason*).)

Defendant relies on Government Code sections 29550, subdivision (d)(2), and 29550.2, subdivision (a), to support his argument that the trial court was required to find his ability to pay before imposing a booking fee. He emphasizes that both statutes authorize the imposition of a booking fee only if the defendant has the ability to pay. However, both Government Code sections 29550 and 29550.2 are inapplicable since they authorize *a county* to collect a booking fee from a person arrested. (Govt. Code, §§ 29550, subd. (c), 29550.2, subd. (a).) In other words, Government Code section 29550 appears to apply to defendants arrested by officers of a county, and Government Code "[s]ection 29550.2 applies to arrests by a 'governmental entity not specified in Section 29550 or 29550.1,' i.e., neither a 'local arresting agency' nor a county, and thus probably in most or all cases a *state* agency such as the California Highway Patrol." (*Mason*, *supra*, 206 Cal.App.4th at p. 1031.) Defendant here was not arrested by a county officer or state agency, and was not ordered to reimburse a county, but rather the Town of Apple Valley.

We conclude the trial court was not required to find an ability to pay before imposing a booking fee under Government Code section 29550.1.

DISPOSITION

The 10-year restraining order and the order requiring defendant to pay appointed counsel fees are reversed. The matter is remanded for the trial court to consider the factors listed in section 273.5, subdivision (i), in order to determine the

necessity and length of an order restraining defendant from contact with the victim. The court is also directed to make a determination of defendant's ability to pay appointed counsel fees, in accordance with section 987.8. In all other respects, the judgment is affirmed.

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HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

KING
J.